

## REPORT BY THE LABOR MEMBERS

### Introduction

The Labor members of the Committee support the objectives of the *FSR Act* and are keen to ensure that the Government monitors the implementation of the Act and the related regulations.

Accordingly, the Labor members recommend a review of the FSR regime post-implementation in 2004.

Previously, the Committee has examined the position of accountants under the FSR Act. The Labor members reiterate their view that accountants who provide financial product advice should not be exempt from the operation of the *FSR Act*.

Subject to the recommendations below, the Labor members support the re-draft of regulation 7.1.29 to carve-out those activities which are not considered to be financial services.

During the hearing a number of arguments have been advanced to support a further exemption from the *FSR Act* for accountants in recommending a superannuation structure to their clients, on the basis that such advice is not investment advice.

In our view, this argument has not been sufficiently made out and is discussed in detail below.

### Investment advice

The key issue that the Committee considered was whether accountants should be exempted from FSR for recommending to their clients a type of superannuation fund structure.<sup>1</sup>

Under regulation 7.1.29, whilst accountants will be able to provide factual information to their clients on the types of fund structure available, they will not be to make a recommendation as to the type of structure a client should adopt. Such advice constitutes “financial product advice” and as such would require the accountant to hold an AFSL.

Advice from Phillips Fox lawyers (tendered by the ICAA during the hearing) confirms that advice to a client recommending a type of super fund structure would fall within the existing definition of “financial product advice”. The Phillips Fox advice states that:

*“An accountant who advises a client about which superannuation structure or combination of structures is most suitable for that client*

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<sup>1</sup> The type of fund structures which a client may choose from include: retail funds, industry funds, corporate funds, small APRA funds, public sector funds and self-managed superannuation funds (SMSF's).

*is making a recommendation or statement of opinion that is intended (or could reasonably be regarded as being intended) to influence the client in making a decision in relation to a particular class of financial products or an interest in a particular class of financial products, so that activity falls within the definition of a financial service and will require a licence unless there is a relevant exemption.”*

The accountants were of the view that such advice should be exempted from the FSR regime on the basis that no investment decision is made by the consumer in choosing a superannuation structure.

Mr Reilly from the ICAA said that:

*“We would argue that the consumer is not making an investment decision because there are not investment products in there. There are no trails in setting up a superannuation fund structure whatsoever. Where the trails come through is when a licensed financial adviser is required to actually put investment products in that superannuation fund.”<sup>2</sup>*

Others argued that setting up a self-managed super fund was simply setting up an empty vehicle.

Mr Lawrence said that:

*“We are talking about the establishment of a fund. The establishment of a fund is the mere signing of a bunch of documents....Establishing a super fund is simply signing a document under the Superannuation Industry (Supervision) Act which says that this fund is set up by them power for the benefit of the members for their retirement; end of story. It is a piece of paper which is then signed by the trustee, signed by the members stamped in some states, and not in others and that is it.”*

The Labor members are of a different view.

In our view, choosing to set up a self-managed super fund is a choice which entails an investment decision. Once the decision is made to set up a self-managed super fund – generally, the decision to direct funds into that fund is made.

The explanatory statement explains this as follows:<sup>3</sup>

*“Under the FSR, recommending a person establish a SMSF structure is a superannuation investment decision as it is equivalent to recommending a person becomes a member of a SMSF. Further, when a person accepts a recommendation to establish a SMSF, that client will probably not consider seeking further advice*

<sup>2</sup> Committee Hansard, 16 June 2003, p. 14.

<sup>3</sup> Explanatory Statement, *Corporations Amendment Regulations 2003 (No. 3) Statutory Rule No. 85*, p. 5.

*from a licensed person on what other investment alternatives may be suitable in their circumstances. “*

The Labor members believe that recommending one superannuation structure over another constitutes an investment decision.

It is not an ordinary investment decision; it is one that has the potential to impact on the consumers' retirement and their future economic well being.

Accordingly, consumers are entitled to the protection afforded by the *FSR Act* in relation to such a decision.

In light of these issues and the overriding objective of the legislation to protect the interests of consumers, the Labor members do not support the Committee's recommendations.

The Committee's recommendation that the regulation should be amended to exempt accountants from the FSRA for recommendations in relation to superannuation fund structures is not supported, nor are the recommendations for broader carve-outs for accountants.<sup>4</sup>

### **Qualifications**

In seeking an exemption for advice on superannuation fund structures, the accountants also argued that they are the best-qualified practitioners to deliver advice on choice of superannuation structure and that they provide independent advice.

#### *Qualifications*

Mr Reilly from the ICAA said that:

*“..it is the accountant who is best placed to provide that impartial, independent advice.”*

Mrs Orchard made the point that distinguishing between the broad classes of superannuation is *“part of our postgraduate training”*.

Ms Bowler made the point that she had done the diploma in financial planning and that:

*“.....we did not cover the structural issues for superannuation. It covered what you should invest in, it covered all the different types of superannuation products, but it did not cover whether a self-managed super fund, an industry fund or a retail fund is most appropriate. I do not think it was considered part of financial product advice.”<sup>5</sup>*

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<sup>4</sup> In paragraphs 3.55 and 3.76 of the Report  
<sup>5</sup> Committee Hansard, 16 June 2003, p. 16

The Labor members are of the view that these comments highlight the need to increase the minimum training required of people who provide financial product advice to retail clients.

Accordingly, the Labor members recommend that the basic training requirements for financial product advisers include training in relation to the different superannuation structures.

### *Suite of products*

The hearing also raised the issue of independence and the limited suite of products generally recommended by financial planners.

Mr Lawrence and Ms Bowler referred to the ACA/Choice Shadow Shopping survey of the financial planning industry.

Ms Bowler said she sat on the panel for the *Choice* survey and it was found that *“the only people who recommended self-managed super funds were authorised representatives with an accounting background.”*

Mr Lawrence said that:<sup>6</sup>

*“In the 30-odd years that I have been practice, I have not seen one financial planning recommendation which recommends the setting up of a self-managed super fund and which recommends anything other than managed funds. It is an absolute fact of life that the financial planning industry works on commissions; they do not work on fees for service and therefore they do not recommend self-managed superannuation funds.”*

The menu of options which financial planners provide to their clients is an issue which goes to the heart of the FSRA regime.

The fact that few financial planners are offering limited low cost products to clients is an issue which must be addressed particularly in light of the Government’s Choice legislation.

The Labor members are of the view that the Government should require financial planners (and other AFSL holders as required) to offer their clients a menu of superannuation options – which include low cost products.

### **Lawyers**

The Labor members note the concerns raised by the Law Council in relation to custodial and depository services and note that draft regulations have been issued by the Government in relation to this issue.

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<sup>6</sup> Committee Hansard, 16 June 2003, p. 20

The Labor members reiterate their view that the Government must maintain a vigilant oversight of the type of services lawyers are offering and where appropriate make regulations. This is particularly important in light of the growing trend for lawyers to consider commission arrangements with suppliers of services to clients.

### **Miscellaneous**

The Labor members note that the exemptions in the original regulation were restricted to “recognised accountants” whereas the exemptions in the new regulation apply to “a person”.

Recognised accountants are members of accounting professional bodies who are subject to Codes of Professional Conduct and Ethics as well as mandatory Independent Quality Reviews for accountants providing services to the public.

The Labor members recommend that a review of the FSR regime post-implementation in 2004 should be conducted and that such a review should consider whether further consumer protection measures should be implemented in light of the expanded exemption provided in the revised regulation.

Also, we note the concern that ASIC has not given proper recognition to accountants’ professional qualifications and training in PS 146 and recommend that this issue is considered as part of the post-implementation review in 2004.

Senator Penny Wong  
**Labor Senator for South Australia**

Mr Alan Griffin MP  
**Australian Labor Party**

Senator Stephen Conroy  
**Labor Senator for Victoria**

Mr Anthony Byrne MP  
**Australian Labor Party**

